

D.P.U. 94-101

Petition of Massachusetts Institute of Technology, pursuant to the terms of 220 C.M.R. §§ 8.03(2)(b) and 8.06 and G.L. c. 164, § 93, to establish a just and reasonable supplemental, back-up, maintenance rate for services from Cambridge Electric Light Company.

APPEARANCES: Andrew J. Newman, Esq.
Rubin and Rudman
50 Rowes Wharf
Boston, Massachusetts 02110
FOR: MASSACHUSETTS INSTITUTE OF
TECHNOLOGY
Petitioner

John Cope-Flanagan, Esq.
COM/Energy
One Main Street
P.O. Box 9150
Cambridge, Massachusetts 02142-9150

-and-

Emmett E. Lyne, Esq.
Rich, May, Bilodeau & Flaherty
294 Washington Street
Boston, Massachusetts 02108
For: CAMBRIDGE ELECTRIC LIGHT COMPANY
Respondent

L. Scott Harshbarger, Attorney General
By: Edward G. Bohlen
Assistant Attorney General
131 Tremont Street
Boston, Massachusetts 02108
Intervenor

INTERLOCUTORY ORDER ON RELIEF REQUESTED IN ORIGINAL PETITION OF
MASSACHUSETTS INSTITUTE OF TECHNOLOGY

I. PROCEDURAL HISTORY

On May 11, 1994, Massachusetts Institute of Technology ("MIT") filed a petition with the Department of Public Utilities ("Department") to establish a just and reasonable supplemental, back-up, maintenance ("stand-by/supplemental") rate for services from Cambridge Electric Light Company ("Company") required in connection with the operation of MIT's cogeneration facility ("Petition"). Specifically, MIT requested that the Department expeditiously (1) determine that Cambridge has failed to negotiate a just and reasonable cost-based stand-by/supplemental service contract with MIT, and (2) establish a just and reasonable contract rate. MIT stated that the Petition was filed pursuant to G.L. c. 164, §§ 76, 93, and 94 and 220 C.M.R. §§ 8.03(2)(b) and 8.06. The matter was docketed as D.P.U. 94-101.

On May 25, 1994, Cambridge filed an Answer to MIT's petition pursuant to 220 C.M.R. § 1.04(2). The Attorney General intervened as of right in this proceeding pursuant to G.L. c. 164, § 11E. On July 19, 1994, the Department, concerned that MIT had not established that the relief was appropriate, conducted a preliminary conference with MIT, Cambridge and the Attorney General (together "Parties") to discuss the exact nature of the relief requested by MIT. At this conference, it became clear that the Parties were not then prepared to discuss the legal issues relating to the relief requested by MIT; and the meeting was adjourned. On July 27, 1994, the Hearing Officer issued a Ruling and Memorandum, requiring MIT to submit a concise memorandum specifying the precise relief MIT seeks and to support its request with legal and economic analyses. The Hearing Officer also directed MIT to address three questions regarding the Department's authority over this matter. Generally, these questions were: (1) whether the

Department may effect a binding contract between two parties where there is no assent; (2) whether the Department should order Cambridge to file a tariff, the propriety of which the Department may investigate; and (3) whether the Department has any legal authority to compel Cambridge to devise a customer-specific tariff for MIT. The Hearing Officer accorded Cambridge an opportunity to respond.

On August 23, 1994, MIT submitted its Memorandum In Support of Petition ("Memorandum"). In the Memorandum, MIT requested that the Department (1) open an investigation as to the propriety of the rates proposed by Cambridge in its last offer made during negotiations for stand-by/supplemental power; (2) find that such rates are unjust and unreasonable; (3) establish just and reasonable rates; and (4) order Cambridge to provide such service at such just and reasonable rates either under appropriately filed tariffs or under an appropriately filed contract (Memorandum at 3). In support of the relief requested in the Memorandum, MIT cited the Department's authority under 220 C.M.R. § 8.07(2) that an aggrieved qualifying facility may file a petition to investigate the actions of a utility (*id.* at 4). In reference to the Hearing Officer's questions, MIT merely stated conclusions and cited no case law or Department precedent in support of its position. MIT, however, did submit an economic analysis of the replacement and supplemental service rate for the MIT cogeneration project prepared by Drazen-Brubaker and Associates.

On September 7, 1994, Cambridge filed a response emphasizing its commitment to the interests of its customers and claiming that MIT extracted all the concessions it could from the Company during negotiations and now seeks to extract additional concessions through the

Department ("Company Response"). In response to the Hearing Officer's first question, the Company cited legal precedent to support its position that a third party may not impose a contract upon non-assenting parties. Further, the Company asserted that the appropriate legal remedy for MIT is to take service under a generally available tariff pursuant to 220 C.M.R. § 8.06 if efforts to negotiate a mutually acceptable contract are not successful (Company Response at 5). The Company also relied upon precedent and express regulatory provisions which proscribe tariffs designed for only one customer (id. at 7-8).

On October 5, 1994, MIT filed its Reply in which MIT asserts, for the first time, that the principal issue before the Department is whether Cambridge's Rate G-3 is a legal and appropriate rate for stand-by and supplemental service to a qualifying facility such as MIT ("MIT Reply"). MIT supports this latest position with citations to relevant Department precedent and regulatory authority. MIT clarifies its requests as a request for a reasonable, cost-based rate for stand-by/supplemental service, which, absent successful negotiations between the parties, can only be achieved through the Department's exercise of its regulatory authority under 220 C.M.R. § 8.07(2) (id. at 7).

On October 11, 1994, Cambridge filed a letter in response to the MIT filing dated October 5, 1994, disputing the timeliness of MIT's Reply and the appropriateness of MIT's substantive arguments during this preliminary phase of the proceeding ("Company Letter"). Cambridge stated that MIT's Reply continues, in essence, to ignore the specific threshold questions posed by the Department and instead seeks to focus on unclear substantive arguments (id. at 2). The Company requested that the Department reject MIT's efforts to ignore the specific

issues posed in the Hearing Officer's Memorandum and to continually re-cast the nature of this proceeding (id. at 3). Cambridge, however, elected not to file a motion to strike MIT's Reply claiming that it does not seek to impose further burdens and add additional issues for resolution at the preliminary stage of the proceeding (id. at 1).

On November 16, 1994, MIT filed with the Department a motion to amend its Petition filed on May 11, 1994 ("Motion to Amend"). If amended, MIT's Petition would request that "the Department expeditiously determine that the Company has failed to negotiate a just and reasonable cost-based Stand-by/Supplemental service contract with MIT or to have available an appropriate just and reasonable tariff for the provision of these services as required by 18 C.F.R. § 292.305(b) and 220 C.M.R. § 8.06" (Motion to Amend). MIT also specifically requests that the Department establish a just and reasonable tariff rate "with an appropriate service agreement" (id.). On November 22, 1994, the Company filed with the Department a letter indicating that the Company did not object to MIT's motion.

II. DISCUSSION

As an initial matter, the Department notes that in its Petition as originally filed, MIT requested that the Department expeditiously investigate this matter. However, MIT's Petition did not clearly set out the relief MIT requested, nor was it supported with an analysis of the Department's authority to grant such relief. Moreover, MIT's Memorandum failed to address the Department's concerns. MIT was unresponsive to the questions posed by the Hearing Officer and failed to support its assertions with appropriate references to case law or Department precedent. Further, if its Motion to Amend is granted, MIT would be restating the relief it requested

originally which, as noted, raises fundamental questions for the Department.

Nevertheless, the Department will not dismiss the original Petition as filed since it would be more efficient to now treat MIT's filing as a request to investigate the appropriateness of Cambridge's Rate G-3 for stand-by/supplemental service under the Department's discretionary authority to investigate the action of a utility, 220 C.M.R. § 8.07(2).¹ The Department does not here judge the merit of any argument contained in MIT's Reply, or any previous filing. However, the Department determines that the matter properly before the Department is a review of the appropriate rate for stand-by/supplemental service as required by MIT's cogeneration facility. The Department will use the recommended rates in MIT's economic analysis of replacement and supplemental service rates as the starting point for our review.

The Parties' submissions are on file, for public inspection during normal business hours, at the Department's offices, 100 Cambridge Street, 12th Floor, Boston, Massachusetts, 02202. The Department will hold a public hearing and procedural conference on December 22, 1994 at 10:00 a.m., at the Department's offices, 100 Cambridge Street,

¹ The Department declines to rule on the Motion to Amend, since it fails to resolve the jurisdictional issues raised in MIT's original petition.

12th Floor, Boston, Massachusetts. Interested persons may present facts, opinions, or arguments relating to the investigation at the public hearing at the offices of the Department, 100 Cambridge Street, 12th Floor, Boston, Massachusetts, 02202.

By Order of the Department,

Kenneth Gordon, Chairman

Mary Clark Webster, Commissioner